



OIEC QUARTERLY REVIEW

January - March 2010 (Issue 17)

Letter from the Public Counsel

Dear Friends:



In our effort to inform injured employees and/or their beneficiaries of the services that the Office of Injured Employee Counsel (OIEC) provides, we determined that many beneficiaries of a fatality claim were unaware of the existence of benefits for them. As a result we initiated an

outreach program to inform them of those benefits and assist them in the filing of a death or burial benefit claim if they expressed a desire for us to do that on their behalf.

We also have been notifying the appropriate elected representatives that one of his/her constituents had been involved in a fatal work-related accident. Many elected representatives have used that information to extend condolences to the family, which I am quite certain has been very much appreciated.

Death claims are very serious and unique in many ways. It is frequently difficult to identify children born out of wedlock, common law spouses, and other beneficiaries living out of state or even out of the country.

There have been two particularly gratifying instances in the past year where we have identified and located family members of a fatally injured employee. Through the cooperation of employers and perseverance by our Customer Service and Ombudsmen staff, we located an adult son who has now filed for reimbursement for the cost of his father's funeral. In another instance we located a child as a result of a State Representative's efforts.

Often insurance carriers assist us in locating death beneficiaries. We express our appreciation to all of those people and organizations for their assistance in helping identify potential beneficiaries so that appropriate workers' compensation benefits can be paid.

Sincerely,

Norman Darwin, Public Counsel

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Please provide feedback, ask questions, or send a request to be added to the Quarterly Review distribution list at OIECinbox@oiec.state.tx.us.

OIEC Sunset Review: Update

Much has happened in the Sunset Review process since OIEC's last *Quarterly Review* was published. Sunset staff did many things to learn as much as possible about OIEC, its services, and processes including making contact with OIEC staff and workers' compensation stakeholders. Sunset staff also requested detailed information pertaining to many facets of the agency, such as:

- Ombudsman appearances at benefit review conferences and contested case hearings;
- OIEC's outreach and early intervention efforts;
- Information management;
- Internal and external training; and
- OIEC's rulemaking process.

Sunset staff expressed their appreciation to OIEC staff for responding to their requests promptly. The Sunset Staff Report was issued on April 23, 2010 and is available for review on OIEC's website at www.oiec.state.tx.us. Public hearings will be held on May 25 and 26, 2010. These hearings will be an opportunity for the public and stakeholders to provide public comment to the Sunset Advisory Commission about OIEC. A decision hearing will be held on July 6, 2010 where the Sunset Advisory Commission will make a formal vote on the Sunset Staff recommendations included in the Sunset Staff Report.

OIEC Rulemaking

Recently OIEC completed and adopted two new rulemaking initiatives: §276.4 Sick Leave Pool Program and §276.6 Notice of Injured Employee Rights and Responsibilities.



Section 276.4 was adopted as a result of a requirement of Texas Government Code §661.002(c). The Government Code requires state agencies to adopt rules relating to the agency's sick leave pool program. Adopted new §276.4 alleviates hardship caused to an OIEC employee and an employee's immediate family if a catastrophic injury or illness forces an employee to exhaust all sick leave and lose

compensation from the state. This section is also needed to designate a pool administrator and to establish policy, operating procedures, and forms for the administration of the sick leave pool.

Section 276.4 was adopted to implement Texas Labor Code §404.109 as a result of House Bill 673 (Sponsor: Chairman Solomons) that was passed by the 81st Texas Legislature, Regular Session, 2009. Texas Labor Code requires the Public Counsel to adopt the *Notice of Injured Employee Rights and Responsibilities* in the form and manner prescribed by the Public Counsel, after consultation with the Commissioner of Workers' Compensation, to be distributed by the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC).

OIEC Attorneys Become Members of State Bar College of Texas

In an effort to provide current, thorough assistance to the OIEC Team, all OIEC attorneys are now members of the State Bar College of Texas.

The State Bar College is an honorary society of lawyers who complete twice the required number of hours of continuing legal education.

In addition to completing twice the required amount of legal education, all OIEC attorneys have completed additional ethics training.



Amicus Curiae Briefs Filed

OIEC filed *amicus curiae* (friend of the court) briefs in two cases this quarter. (An *amicus curiae* brief is a brief filed with the court by someone that is not a party to the case who believes that the court's decision may affect its interest.)

Bettie Bell v. Zurich American Insurance Company

The central issue in Ms. Bell's case is whether or not the 5th Court of Appeals will rehear a case in which they rendered an impairment rating of 10 percent. Ms. Bell contends that the correct impairment rating should be 20 percent. Initially, a 10 percent impairment rating was made by Dr. M, treating doctor, according to the 4th Edition of the AMA Guides. This rating was also made before Ms. Bell reached maximum medical improvement. Following spinal fusion surgery and maximum medical improvement, Dr. S assessed a 20 percent impairment rating using Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) Advisory 2003-10. The District Court found the 20 percent impairment rating to be invalid because the Advisory has been invalidated. Ms. Bell appealed this decision to the 5th Court of Appeals, but they concurred with the decision of the lower court. Specifically, by invalidating the 20 percent rating the District Court was bound to adopt the only valid impairment rating.

On behalf of Ms. Bell, OIEC has filed an amicus brief with the 5th Court of Appeals to urge them to rehear her case. OIEC's argument begins with the fact that the 10 percent impairment rating was made before Ms. Bell had reached maximum medical improvement. Additionally, the judgment of the trial court was not submitted to TDI-DWC for a 30-day waiting period as required by Texas Labor Code § 410.258. This precluded TDI-DWC from intervening and correcting the improperly assessed 10 percent impairment rating. OIEC argued that to adopt the impairment rating which was made before Ms. Bell reached maximum medical improvement would deprive injured employees of their right *not* to have their impairment ratings prematurely assessed.

Transcontinental Insurance Company v. Joyce Crump

The case of *Transcontinental Insurance Company v. Joyce Crump* concerns a widow who was awarded death benefits for the death of her husband, Charles Crump. Beginning in 1975, Mr. Crump received a kidney transplant, underwent spleen and gallbladder removal, and began a daily regimen of immunodepressants. In May of 2000 he injured his knee on a tape machine while at work. Following this injury, he was admitted to a hospital with an infection of the knee. Over the next eight months, Mr. Crump's health declined aggressively due to an infection until he passed away in January of 2001. The District Court awarded Ms. Crump death benefits because they found that the knee injury—a compensable injury—was a producing cause of Mr. Crump's death. The 14th Court of Appeals in Houston concurred with this decision. On January 20, 2010, the case was heard before the Texas Supreme Court.

OIEC filed an amicus brief on behalf of Respondent, Joyce Crump, urging the Supreme Court to affirm the decision of the Court of Appeals. The case hinges around two main points: (1) whether producing cause can be defined liberally as a cause, or whether it should be narrowly defined as a substantial cause; and (2) whether expert medical testimony can come from clinical opinion or whether it must adhere to a more rigid standard—evidence based medicine.

OIEC argued that part of the liberal interpretation of the workers' compensation law is that a pre-existing condition is not a reason to deny a workers' compensation claim, unless the pre-existing condition is proven to be the sole cause of the claimed injury. This idea illustrates the long-held description of workers' compensation benefits as "limited benefits, liberally provided." In its brief, OIEC attempted to stress with the court that to rule in favor of the carrier—who argues that a pre-existing condition can be sufficient to deny a claim—on this issue would be to undermine the long-established liberal interpretation of workers' compensation law. Additionally, OIEC urged the Supreme Court to reject the carrier's argument that only evidence based medicine is sufficient in workers' compensation cases. On this matter OIEC argued that if the court were to determine that the treating doctor's opinion was not sufficient to be an expert opinion, it would unfairly hinder injured employees from obtaining expert testimony to favor insurance carriers who are able to hire experts.

The outcome of *Crump* has the potential, in OIEC's view, to greatly upset the balance between the interests of employers and employees by adopting the stringent legal and evidentiary standards in workers' compensation cases for which the carrier argues.



Employer's Notice of Ombudsman Program to Employees

OIEC recently redesigned the *Employer's Notification of the Ombudsman Program to Employees* so it would more closely match the design of other agency publications. However, only the design was changed, not the content. So either the prior design (12/06) or this new design (03/10) would be acceptable for posting.

Please remember:

- All employers participating in the workers' compensation system shall post notice of OIEC's Ombudsman Program.
- This notice shall be posted in the personnel office, if the employer has a personnel office, and in the workplace where each employee is likely to see the notice on a regular basis.
- This notice of the Ombudsman Program shall be publicly posted in English, Spanish, and any other language that is common to the employer's employees.
- This notice shall be the text provided by OIEC without any additional words or changes.

The notice is available on the OIEC website at www.oiec.state.tx.us/resources/employernotice.html and is available in English, Spanish, Vietnamese and Chinese.

OIEC Quality Assurance



Quality Assurance's mission is to "achieve continuous improvement through employee engagement and empowerment, teamwork, training, and best practices."

To do so, it provides informal audit and review functions to ensure quality and efficiency of the procedures and services provided by OIEC. It ensures all policies and procedures are being followed by agency staff and develops training specifically tailored to address exceptions identified through the quality reviews and internal audits.

Quality Assurance is a new section that was created in June 2009. In its short existence it has already had a valuable impact on the agency in the following ways:

- provided training to agency staff in central office and the field offices;
- conducted quality reviews of twelve OIEC field offices;
- kept employees involved in identifying areas for improvement and including them in the development of action plans to accomplish the business process improvement;
- developed the OIEC Approved Acronyms and Abbreviations List;
- created new shortcuts (macros) for entries made in the computer claims system;
- served as the liaison for the OIEC Survey of Employee Engagement;
- developed drafts of training manuals for the Ombudsman and Customer Service Program Areas;
- incorporated the data and information derived from these activities into best practices that are shared with all agency employees; and
- involved in various projects designed to improve the way the agency conducts business.

Quality Assurance Associate Director Stephen Lawson stated that "much of what we have accomplished is directly attributable to the ideas and suggestions that have come from OIEC employees outside of the Quality Assurance Section." He said that in order to keep flow of ideas going, he has assigned a member of the Quality Assurance Section to serve as a liaison to each agency program area. Through this intra-agency cooperation, the Quality Assurance Section will continue to be successful in its mission of continuous business process improvement.



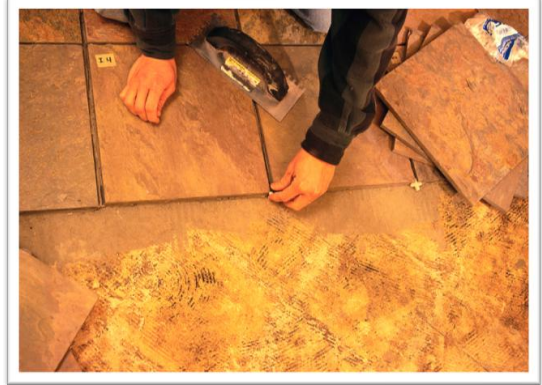
Customer Service Successes

Customer Service Representatives continue to overcome challenges in their attempts to provide assistance and early intervention.

In Lubbock, Cindy Nava was contacted by an injured employee who had sustained a work-related hernia in 2005. During the operation to repair the hernia, the colon was perforated causing numerous long-term medical complications, some of which the carrier denied as being related to the compensable injury. Ms. Nava assisted the injured employee in requesting a designated doctor to address the extent of the injury. The designated doctor examined the injured employee, requested additional tests, performed research, and wrote a thorough report. Ms. Nava then contacted the adjuster and convinced her to accept the compensability of the medical conditions that the designated doctor opined were related to the original compensable injury and approve the appropriately related medical treatment.

In San Antonio, Edna Vega assisted an injured employee who had returned to work but was not being paid for a 40 hour work week. She discovered that the injured employee had been released to limited duty work and that he had received a bona fide job offer from his employer, which he accepted. However the employer was not allowing him to work a full 40 hours per week. Ms. Vega contacted the employer and explained that they were required to file a form DWC06 (*Supplemental Report of Injury*) on which the employer reports return to work and post-injury change in earnings. Upon receipt of the form, the adjuster determined the insurance carrier owed the injured employee nearly \$3,000.00 in temporary income benefits for the weeks that he had been working limited duty at less than 40 hours per week.

Customer Service Representatives always work closely with the injured employees to ensure they receive the benefits to which they are entitled.



OIEC Information Packet for Injured Employees

OIEC's outreach efforts have resulted in the development of education and advocacy information to be provided to an employee when they sustain a work-related injury. The information packet is a folder with brochures that can help injured employees better understand the workers' compensation system.

This information is also available (at no cost) for employers, health care providers, or any entity to provide them to injured employees.

If you are interested in obtaining copies of OIEC's education materials for yourself or to share with your customers, please send an email to OIECInbox@oiec.state.tx.us.

Question of the Quarter

Q: My company has a conference coming up and would like to have a session on workers' compensation. Does OIEC provide public speaking services?

A: Yes, part of OIEC's mission is education. OIEC can provide someone to explain the services OIEC offers and/or an overview of the Texas workers' compensation system.

If you would like to request an OIEC speaker for any speaking engagement or conference please send a request to the OIEC inbox at OIECInbox@oiec.state.tx.us



Executive Management Expand Their Public Service and Professional Affiliations

Several members of OIEC's Executive Management are participating in activities outside of OIEC which enrich their ability to lead the agency.

Center for Public Policy Dispute Resolution at the University of Texas Fellows Program. Brian White, OIEC Deputy Public Counsel and Chief of Staff, was nominated and accepted as a Fellow at the Center for Public Policy Dispute Resolution at the University of Texas. Appointed by the Dean of the Law School, he will participate in the program in Austin May 5-7, 2010 as a Public Policy Fellow. Public Policy Fellows are government policymakers with many years of experience in the public policy arena.



This select group of Texas professionals represents a wide range of public policy service and experience. The Fellows class will receive specialized training which will help them address and manage public policy issues through collaborative and dispute resolution processes. By educating the Fellows about such processes and their application in the public and non-profit sector, they become resources in those areas for governmental and non-profit entities. If Texas leaders use the collaborative and dispute resolution processes in an informed way, it can result in public cost savings, increased efficiency of public administration, and enhanced quality of public services.

Mid-Size Agency Coordinating Council (MACC). Brian White serves as the MACC Chair and Kristi Dowding, Operations Analyst, serves as the MACC Vice Chair. The purpose of the MACC is to promote communication and education on issues affecting member agencies such as budget, finance, human resources, and information technology. It is comprised of members from state agencies that have at least 100 but not more than 799 full-time equivalent staff positions. The MACC members meet monthly and serve as a resource on required agency reporting and the latest government initiatives.

State Agency Council. Elaine Chaney, Director of Legal Services, was appointed as OIEC's member on the State Agency Council and Luz Loza, Director of the Ombudsman Program, is the alternate. They will serve a two-year term through December 31, 2011. The State Agency Council supports the goals of the Governor's Commission for Women and hosts the Outstanding Women in Texas Government awards. The Council is a valuable resource as it provides opportunities for professional development, community service, and discussion of women's issues.

Executive Women in Texas Government (EWTG). Elaine Chaney, Luz Loza, and Director of Customer Service Nancy Larsen are also actively involved in EWTG which is a nonprofit, non-partisan organization that encourages and develops women leaders in Texas government and higher education. EWTG hosts many events for members and guests, including an annual conference, monthly luncheons, networking opportunities, and professional development. Its members also are involved in many community service projects. OIEC works closely with TDI-DWC and has invited several of their employees to attend the next EWTG function as its guests.



Case Study

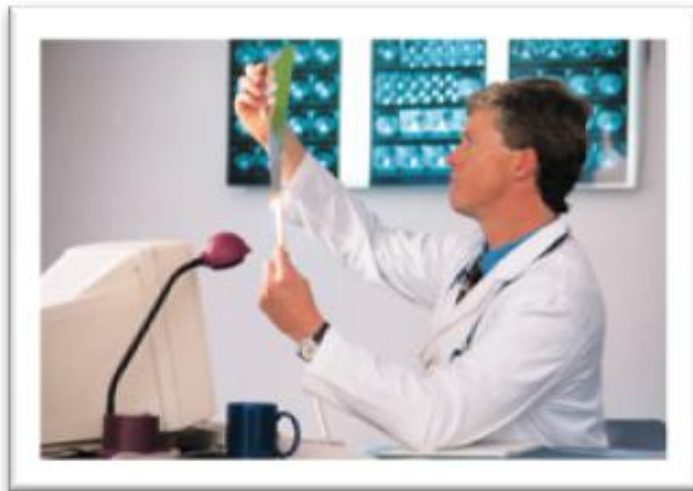
Threshold Issues

Nancy Gonzales, San Antonio Ombudsman, recently assisted in a case in which the outcome stresses the importance of thorough research in cases involving threshold issues to ensure that injured employees can seek the maximum amount of benefits to which they are entitled.

Claimant, Mr. C, was employed by a geo-surface testing company and was injured on May 15, 2006 when he twisted his knee while carrying an asphalt core sample down the steps of a trailer. He was diagnosed with lateral and medial meniscus tears and underwent arthroscopic surgery three months later. An additional arthroscopy was performed in November 2006 to address his continuing pain. Following this surgery, Mr. C's knee became septic and he contracted a staph infection (MRSA) that spread to his neck. Additionally, Mr. C contracted an epidural abscess along his cervical vertebrae. The carrier argued that the meniscus tears were degenerative in nature and were unlikely to have been caused by the twisting of Mr. C's knee. The carrier only accepted a sprain/strain injury. The case went to a contested case hearing where a Decision and Order dated May 1, 2009 determined that the compensable injury extended to include left knee osteoarthritis, medial and lateral meniscus tears, left knee staph infection, and cervical staph infection but did not extend to include left knee chondromalacia.

At the time that Mr. C's case was assigned to Ombudsman Gonzales, the only issue was a dispute of the treating doctor's maximum medical improvement and impairment rating—a 2 percent impairment rating given on Dec. 8, 2006. In reviewing the case, Ms. Gonzales identified extent of injury, disability, and 90-day finality as additional issues. Here, the importance of identifying the threshold issue can be seen. Ms. Gonzales identified the extent of injury as the issue that, if accepted, would allow Mr. C to overcome the 90-day finality in his case, thus allowing the additional injuries to be rated by invoking the designated doctor process.

(Continued on page 8)



Program Area Employee Spotlight

Gina McCauley (Legal Services), Regional Staff Attorney

Statistically, medical contested case hearings are the most daunting type of hearing facing the OIEC Ombudsmen. In the past year, Austin Field Office Regional Staff Attorney Gina McCauley took a leading role in addressing this problem by increasing the Ombudsmen's access to evidence based medicine which could help them develop an injured employee's case. In order to do this, Gina took it upon herself to meet with medical school librarians across the state and coordinate with them a way to deliver training to the Ombudsmen. When asked to comment on this project, Gina gave most of the credit to the librarians for their help. Director of Legal Services Elaine Chaney commended Gina for identifying a problem and taking a proactive approach to solving it. In past instances, Elaine has also remarked about Gina's ability to take complex information and break it down into a readily understood form. She has a gift for communicating things and is something of an expert on mediums for communication.

Outside of work, Gina is an avid writer. She has written on a variety of subjects and has published articles with *The Guardian*. She has completed the National Novel Writing Month (NaNoWriMo), in which participants must complete 50,000 words of original prose within thirty days. In April, she plans to write 100 pages of a script in a similar contest called "Script Frenzy." Besides writing, she enjoys films (especially those by Clint Eastwood) and community involvement. She is currently attending cooking classes at Whole Foods.

Case Study: Continued

At the time of the contested case hearing, the carrier contended that the additional injuries could not have resulted from the compensable injury. By carefully studying the mechanism of injury through an exhaustively large amount of medical records in Mr. C's case, Ms. Gonzales was able to familiarize herself with MRSA, osteoarthritis, and chondromalacia. The line of questioning presented to Dr. G allowed Ms. Gonzales to obtain the additional information needed to prevail on the extent of injury issue. Consequently, at the contested case hearing for the 90-day issue, Mr. C prevailed and was able to invoke the designated doctor process to assess the new injuries. Following the report of the designated doctor, Mr. C's impairment rating was raised from 2 percent to 30 percent, which entitled him to claim additional benefits for more than 20 months.

At the onset, Mr. C's case appeared to a simple case involving a dispute of maximum medical improvement and impairment rating. However, by listening to Mr. C, Ms. Gonzales realized the complexity of the issues at play. She was methodical in her approach to resolving the issues to Mr. C's great benefit.

OIEC Audit Reports Available on the Internet

Reports prepared in connection with OIEC's Internal Audits are now available on the agency's public internet website. You can find them at www.oiec.state.tx.us listed under the "Publications and Announcements" link.

OIEC is one of only a few agencies to publish these reports on their website along with budget information monthly. Recently completed reports include the Complaint Process Follow-up Review and the Customer Service Program Audit.

New OIEC Brochure Death and Burial Benefits

OIEC has developed the "Death and Burial Benefits" brochure for the potential beneficiaries in a workers' compensation fatality claim. The brochure provides an overview of these benefits and the people who might qualify as beneficiaries. Copies of the brochure can be obtained in all OIEC field offices. The brochure is also available on the OIEC Internet at www.oiec.state.tx.us in the Publications and Brochures section of the "Publications and Announcements" link.

